86-702 (1)

Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

R. LEE JOHNSON and FRANCES K. JOHNSON,
Petitioners,

vs.

FEDERAL LAND BANK OF LOUISVILLE and FARMERS PRODUCTION CREDIT ASSOCIATION OF ASHLAND,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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October 28, 1986

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QUESTION PRESENTED

Whether a violation of the Farm Credit Act of 1971, Section 2001 *et seq.*, Title 12, U.S. Code, and specifically, 12 C.F.R., Section 614.4510, requiring forbearance from foreclosure in cases where the farmer can demonstrate he is cooperative, making an honest effort to meet the conditions of the loan contract, and is capable of working out of the debt burden, constitutes a valid defense to a farm foreclosure action, i.e. is the Due Process Clause of the Fourteenth Amendment violated when a farmer can demonstrate his compliance with the forbearance regulation and such compliance is not recognized as a defense to a foreclosure action.

PARTIES

The parties named in the caption are the only parties to this action.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Petitioners hereby request that this Court issue a Writ of Certiorari to review a judgment of the Supreme Court of Ohio entered on June 11, 1986.

OPINIONS BELOW

The Opinion of the Ohio Supreme Court, case style, *Farmers Production Credit Association of Ashland v. Johnson,* (1986) 24 Ohio St.3d 69, which Opinion is re-printed as Appendix A, pp. A1 to A18 of this Petition.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered in this action on June 11, 1986 and a rehearing was requested and denied as re-printed as Appendix A, p. A34 of this Petition.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1257(3).

STATUTES INVOLVED

The statute involved in this Petition is 12 U.S.C., Section 2001 *et seq.*, and specifically 12 C.F.R., Section 614.4510 which provides as follows:

> The bank and associations that are originating lenders shall be responsible for the servicing of the loans which they make. However, loan participation agreements may designate specific loan servicing efforts to be accomplished by a participating institution. The bank board of directors shall direct the bank and associations to adopt loan servicing policies and procedures to assure that loans will be serviced fairly and equitably for the borrower while minimizing the risk for the bank and associations. Procedures shall include specific plans which help preserve the quality of sound loans and which help credit deficiencies as they develop . . .
>
> (d) In the development of the bank and association loan servicing policies and procedures, the following criteria shall be included:
>
> (2) *Operating Loans.* The objective shall be to service such loans to assure disbursement in accordance

with the basis of approval, repayment from the sources obligated or pledged and to minimize risk exposure to the lender. Procedures shall require: (i) The procurement of periodic operating data essential for maintaining control, for the proper analysis of such data and prompt action as needed; (ii) Inspections, reappraisals and borrower visits appropriate to the nature and quality of the loan; (iii) Controls on insurance, margin requirements, warehousing, and prompt exercise of legal options to preserve the lender's collateral position and guard against loss. The policy shall provide a means of forbearance for cases where the borrower is cooperative, making an honest effort to meet the conditions of the loan contract and is capable of working out of the debt burden.

* * *

(4) *Approved Policies.* Copies of the bank loan servicing policies required under this Subpart O and all subsequent revisions shall be furnished to the Farm Credit Administration.

(Appendix A, pp. A22 to A33).

STATEMENT OF THE CASE

Introduction

R. Lee Johnson and Frances K. Johnson own Mill Brook Farms, which consists of approximately fourteen hundred acres in Central Ohio. Farmers Production Credit Association of Ashland ("PCA") and Federal Land Bank of Louisville ("FLB") are federally chartered corporations in the business of lending funds to farm owners. Under the Farm Credit Act of 1971, Section 2001 *et seq.*, Title 12, U.S. Code, both lenders hold mortgages on separate por-

tions of Mill Brook Farms as security for loans made to Petitioners.

R. Lee and Frances K. Johnson are breeders of pure bred Shorthorn Cattle which, among other farming activities, is the mainstay of Mill Brook Farms. Due to an unforeseen disease known as Brucellosis, the Department of Agriculture ordered Petitioners to slaughter one hundred head of cattle, thus precipitating the economic crisis at Mill Brook Farms causing Petitioners to become delinquent on their debts to FLB and PCA. Petitioners lost approximately $600,000.00 as reflected at Appendix A, p. A21 of this Petition.

In defense of the ensuing foreclosure actions commenced by FLB and PCA on September 26, 1983 and October 4, 1983, respectively, Petitioners raised as a defense the failure of FLB and PCA to comply with the provisions of the Farm Credit Act of 1971, Section 2001 *et seq.*, Title 12, U.S. Code. Specifically, U.S.C., Section 2019 states in part as follows:

> The Federal land banks may provide technical assistance to borrowers, members, and applicants and may make available to them at their option such financial related services appropriate to their on-farm and acquatic operations as determined to be feasible by the board of directors of each district bank, under regulations of the Farm Credit Administration.

The objectives of the policies and procedures for Federal land banks are numerated in 12 C.F.R., Section 614.4510, which includes the following provisions:

> The bank and associations that are originating lenders shall be responsible for the servicing of the loans which they make. * * *. The bank board of directors *shall*

> direct the bank and associations *to adopt loan servicing policies and procedures to assure that loans will be serviced fairly and equitably for the borrower* while minimizing the risk for the bank and associations. Procedures *shall* include specific plans which help preserve the quality of sound loans and which help credit deficiencies as they develop.

(Emphasis added)

Petitioners argued, in defense of the foreclosure actions, that this policy *required* forbearance if the specific criteria set forth at 12 C.F.R., Section 614.4510(d)(1) had been met. The Section provides:

> (d) In the development of the bank and association loan servicing policies and procedures, the following criteria *shall* be included:
>
> (1) * * * The objective shall be to provide borrowers with prompt and efficient service * * *. The policy *shall* provide a means of forbearance for cases when the borrower is cooperative, making an honest effort to meet the conditions of the loan contract and is capable of working out of the debt burden.

(Emphasis added)

The record before the Supreme Court of Ohio is void of any evidence that FLB or PCA had any forbearance policy in effect at the time of the foreclosures or that such policy was ever shown or made known to Petitioners. Petitioners alleged that they had always been cooperative with these lending authorities, were making an honest effort to meet the conditions of the loan and were capable of ultimately working out of the debt burden.

The State Court And Appellate Court Decisions

The trial court and appellate court found, as a matter of law, that the Farm Credit Act of 1971 and the "forbearance provision" of Section 614.4510(d)(1) did not create a valid defense. Petitioners appealed these Decisions to the Supreme Court of Ohio and the appeals were consolidated and heard in one case before the Supreme Court.

The Appeal To The Supreme Court Of Ohio

The Supreme Court of Ohio accepted the two appeals of Petitioners, consolidated the appeals and granted a "stay of execution" pending final resolution on the merits. On June 11, 1986, in a split four-three Decision, the Supreme Court of Ohio held that the specific language of C.F.R., Section 614.4510(d)(1) did not provide a valid defense to a foreclosure action. The Decision and dissenting Opinions are set forth at Appendix A, pp. A1 to A18 of this Petition. On the 23d day of June, 1986 the Supreme Court of Ohio granted Petitioners a stay of execution to perfect the present appeal to the United States Supreme Court. Appendix A, pp. A35 to A36. This stay was continued by Order of September 17, 1986. Appendix A, pp. A37 to A38.

REASONS FOR ALLOWING THE WRIT

Introduction

The issue which Petitioners seek to have reviewed by the Supreme Court of the United States in the case at bar affects every farmer in America. It involves the striking of a proper balance between the lender's authority to foreclose and the farmer's right to economic survival if he can demonstrate his compliance with the three-prong test of 12 C.F.R., Section 614.4510(d)(1), *viz.*, that he is "cooperative, making an honest effort to meet the conditions of the loan contract, and is capable of working out of the debt burden".

The issue presented by this appeal is simple and straightforward. Does Section 614.4510(d)(1) provide the American farmer with a substantive rule that Federal land banks must follow when they service farm loans? Does the regulation create a substantive rule which affects individual obligations and thus have the force and effect of law?

The Writ Of Certiorari Should Be Allowed

When FLB and PCA foreclosed against Petitioners' fourteen hundred acre Mill Brook Farm, they did not take into consideration the economic plight of Petitioners created by an act of God. Petitioners were not poor business managers, but rather the victims of an unforeseen cattle disease, known as brucellosis.

It was the very situation in which Petitioners found themselves that Section 614.4510(d)(1) was drafted to address. This Regulation is *not* discretionary but, by its

own terms, a mandatory provision affecting individual rights. Again, the Regulation reads in part as follows:

> The policy *shall* provide a means of forbearance for cases where the borrower is cooperative, making an honest effort to meet the conditions of the loan contract, and is capable of working out of the debt burden.

Petitioners' position in this case is supported by *DeLaigle v. Federal Land Bank of Columbia,* (D.Ga. 1983) 568 F. Supp. 1432 at 1437 noted:

> [T]he Federal Farm Credit Board issued the regulations in question in this case, pursuant to the authority specified in the statutory section labeled "Powers of the Federal Farm Credit Board," 12 U.S.C. Section 2243 (1976). Section 2243 states in part that "[t]he Federal Farm Credit Board shall establish the general policy for the guidance of the Farm Credit Administration." The loan servicing techniques that Federal land banks may provide—according to 12 U.S.C. Section 2019 (1976)—are subject to the regulations of the Farm Credit Administration.

Accordingly, the finding in *DeLaigle* is the only reasonable interpretation of Section 614.4510(d)(1) as stated therein:

> The regulation states in part that: "[T]he policy *shall* provide a means of forebearance" 12 C.F.R., Section 614.4510 (1981). This language does not blandly describe agency policy. The use of the word "shall" dictates agency policy. The provisions of this regulation are substantive rules that Federal land banks must follow when they service farm loans. These provisions affect individual obligations. The bor-

> rowers whose loans the Federal land banks service benefit by this "means of forbearance." While the Court has focused its attention on this "forbearance" provision of the regulation, the Court concludes that Section 614.4510 in its entirety is a substantive rule affecting "individual obligations."

Three of seven justices of the Ohio Supreme Court, including the Chief Justice, found the above Regulation to have the force and effect of law and thus a valid defense to a farm foreclosure action if the three-prong test thereunder can be met. Yet, it was undisputed that neither .2. or .3. had any forbearance policy in effect at the time Petitioners became Defendants in 1983. Justice Douglas at page 77 of the Ohio Decision points out:

> The record in this case indicates that appellees, Farmers Production Credit Association of Ashland and the Federal Land Bank of Louisville, either had no forbearance policy in effect at the time of foreclosure or such policy was never shown or made known to appellants. Conversely, appellants alleged that they were cooperative, were making an honest effort to meet the conditions of the loan and were capable of working out of the debt burden.

Finding that Section 614.4510 has the force and effect of law, Justice Douglas at page 79 reasoned:

> Consequently, I agree with the court's conclusion in *DeLaigle* that "these regulations . . . were issued by the appropriate agency pursuant to statutory authority" and therefore should have the " 'force and effect of law.' " *Id.* Unlike the VA manual in *Harvey*, Section 614.4510 is a formal agency regulation, promulgated pursuant to statutory authority.

Secondly, Section 614.4510(d)(1) states that there "shall" be a means of forbearance provided. The use of the word "shall" mandates agency policy. The provisions of this regulation are rules which must be followed by federal land banks when they service farm loans. On the other hand, the appellant-borrowers in *Harvey* conceded that the VA manual's provisions *were not* formal agency requirements. *Id.* at 64. Additionally, the *Harvey* court noted that the language of the manual was "clearly permissive rather than mandatory" and "[o]n its face . . . does not purport to create a binding obligation." *Id.* The court also observed that the manual itself characterized the provisions for servicing defaulted loans as merely "preferable," and in paragraph 2.18(c) of the manual, it is stated that "strict compliance with these procedures may be impracticable or even impossible under certain conditions." *Id.* As such, where it is alleged that the bank has failed to comply with Section 614.4510(d)(1), as in the case *sub judice*, a valid defense to the bank's foreclosure action may exist.

While I intend to make no attempt to frustrate banks in the conduct of their business, including foreclosure where required, the cases at bar should be remanded and given a hearing on the merits under the facts presented. If it can be shown that the criteria outlined in Section 614.4510(d)(1) were not met by the appellants, foreclosure is warranted and should be upheld. However, compliance on the appellant's part may well require the opposite result.

For the foregoing reasons, I must respectfully dissent.

The statutory scheme of forbearance of the Farm Credit Act of 1971 is also found in The National Housing Act, 12 U.S.C., Section 1701 *et seq.*, as amended, which provides for the HUD Mortgage Insurance Programs. This program was designed to encourage home ownership by low-income persons, and those who might otherwise be unable to obtain conventional financing for a mortgage, in furtherance of the national housing policy of providing a decent home and suitable living environment for every American.

In *Federal National Mortgage Association v. Ricks*, 372 N.Y.S. 2d 485, 490 (Sup. Ct. N.Y. 1975), the court detailed the history of the program under which the defendant obtains his mortgage loan.

> Mortgagees are induced to enter into these essentially risk-free mortgage contracts by being guaranteed that they will suffer no loss in the event of default. However, only mortgagees who have been approved by HUD may hold mortgages in this program (12 U.S.C.A. Section 1709[b][1]) and under this same section, mortgagees have to be "able to service the mortgage properly." This requirement of servicing is also contained in the HUD regulations (24 C.F.R. Section 203.9).

Like Production Credit Associations and Federal Land Banks, the mortgagee under HUD regulations is required to properly service the mortgage. 24 C.F.R., Section 203.604 states in relevant part:

> (b) The mortgagee must have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage are unpaid. If default occurs in a repayment plan arranged other than during a personal interview, the mortgagee must have

> a face-to-face meeting wih the mortgagor, or make a reasonable attempt to arrange such a meeting, within thirty days after such default and at least thirty days before foreclosure is commenced.

In discussing the impact of HUD regulations and guidelines, the court in *Brown v. Lynn,* 392 F. Supp. 559, 562-563 (N.D. Ill. 1975) stated:

> On the theory that the guidelines are sensible, equitable standards of conduct, consistent with and issued in furtherance of, the national housing goals, foreclosure courts can, and in appropriate instances should, direct the parties to pursue and exhaust the alternatives to foreclosure enumerated in the Handbook. Merely rubber-stamping mortgagees' foreclosure actions, when they have acted barely within the formal legal bounds of these loosely defined housing programs, will contribute further to the needless loss of homes and to the creation of virtual ghost ideas within our inner cities. Foreclosure courts need not woodenly perpetuate the national tragedy surrounding quick foreclosures to which we referred in our earlier opinion, but, where appropriate, they should require adherence to the policies and procedures prescribed by the Handbook.

As urged by Petitioners herein, the HUD regulations above have the force and effect of law because the Congress properly delegated authority to HUD to promulgate them. U.S.C., Sections 1709(a), 1709(b)(1), 1715(b), and 1715(u), U.S.C., Section 3535(d). Non-compliance with these HUD regulations regarding servicing of its insured mortgages operates as a bar to foreclosure upon said mortgages.

In *Federal National Mortgage Association v. Ricks*, 372 N.Y.S. 2d 485 (Kings Cty., N.Y. Sup. Ct. 1975), the court recognized a violation of the HUD Handbook as a raisable equitable defense to a mortgage foreclosure, relying strongly on the reasoning of the Cook County Circuit Court in *Federal National Mortgage Association v. Huffman*, unreported Cir. Ct. Cook County, 1975, 73 CH 7453. *Huffman* was extensively analyzed and discussed in Note, *The Enforcement of HUD Mortgage Foreclosure Guidelines: Possible Illinois Court Interpretations*, 52 Chi.-Kent L. Rev. 703, 706-12 (1976).

The *Ricks* Court held as follows:

> To allow the F.N.M.A. or any mortgagee under the program to ignore these HUD Handbook guidelines would be to permit it to subvert the very goal the program was established to achieve and to make a mockery of the National Housing Act. This Court "cannot take part in a travesty upon the Congressional purpose." (*F.N.M.A. v. Huffman, supra*). Consequently, notwithstanding the failure of HUD to publish its Handbook in the Federal Register, this court concludes that participating mortgagees under Section 203 of the National Housing Act (12 U.S.C. Section 1709), and the assignees, are obligated to follow the guidelines established in the HUD Handbook in the event of a mortgagor's default. *Their failure to do so may constitute unconscionable conduct so as to deny the mortgagee the foreclosure relief it is seeking.*
>
> This court is not determining at this time the extent to which the mortgagee must comply with the HUD Handbook or whether in the instant case the plaintiff has or has not so complied; these matters are left for a trial of the action. Rather, for the purposes of the

> motion raised herein, *this court holds that the defendants Ricks may interpose as a first defense the failure of the plaintiff to comply with the provisions of the HUD Handbook.*

(Emphasis added)

The reasoning in *Ricks* was followed in *Bankers Life Co. v. Denton,* 458 N.E.2d 203, 204-205 (Ct. App. Ill. 1983) "mortgagors must be allowed to raise non-compliance with servicing requirements as a defense to a foreclosure action" and in *Heritage Bank v. Ruh,* 191 N.J. Sup. 53, 465 A.2d 547 (N.J. Sup. Ct. 1983) accord.

Petitioners submit that the HUD regulation and their applicability to foreclosure action is exactly analogous to the forebearance under the 1971 Farm Credit Act. Noncompliance therewith is a valid defense to a subsequent foreclosure action.

The plight of the American farmer is well known to the world. Farmers who have worked decades to feed the American people have fallen on hard times. 12 C.F.R., Section 614.4510(d)(1) is a mandatory regulation which allows the farmer some necessary cushion when hard times exist. The regulation does not state that the farmer need not repay his loan, only that forbearance is required for that period of time necessary for him to get back on his feet.

The majority of the Supreme Court of Ohio recognized the plight of the American farmer at page 76 of its Decision:

> This court takes notice that the strength of our state lies in its agriculture industry. We also recognize that many of this nation's family farms which are

products of generations of hard work and sacrifice have succumbed to the perils of foreclosure. High interest rates and declining exports have created the worst farm depression since the 1930s. The men and women who toil to feed not only this nation, but the entire world, deserve a much better fate. With this in mind, we urge our federal government to take the measures necessary to provide these proud men and women with the relief they so justly deserve.

It is respectfully submitted that 12 C.F.R., Section 614.4510(d)(1) has the force and effect of law. Certiorari should be granted to review this regulation which affects every American farmer.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: October 28, 1986
Columbus, Ohio

DECISION OF SUPREME COURT OF OHIO

FARMERS PRODUCTION CREDIT ASSOCIATION OF ASHLAND,
Appellee,

vs.

JOHNSON ET AL.,
Appellants.

FEDERAL LAND BANK OF LOUISVILLE,
Appellee,

vs.

JOHNSON ET AL.,
Appellants.

[Cite as Farmers Production Credit Assn. of Ashland *v.* Johnson (1986, 24 Ohio St. 3d 69.]

Foreclosures—Farm Credit Act of 1971—Valid defense to foreclosure action not provided in 12 C.F.R., Section 614.4510(d)(1)—"Means of forbearance," explained.

O.Jur 2d Mortgages § 345.

The specific language of 12 C.F.R., Section 614.4510(d)(1) does not provide a valid defense to a foreclosure action.
(Nos. 84-1915 and 85-860—Decided June 11, 1986.)

APPEALS from the Court of Appeals for Knox County.

The actions herein have been consolidated for review. Appellants, R. Lee Johnson and Frances K. Johnson, own Mill Brook Farms which consists of approximately fourteen hundred acres of land. Appellee Farmers Production Credit Association of Ashland ("PCA") is a federally chartered corporation in the business of lending funds to

farm owners. Appellee Federal Land Bank of Louisville ("FLB") is a corporation organized under the Farm Credit Act of 1971, Section 2001 *et seq.*, Title 12, U.S. Code, and is also in the business of lending funds to farm owners. Both lenders hold mortgages on separate portions of Mill Brook Farms as security for loans made to the appellants. Both brought foreclosure actions against the appellants and were granted the relief they requested. The appellants appeal both actions.

In case No. 84-1915, the following facts are relevant. Appellants executed and delivered a promissory note to PCA in the amount of $100,000 on January 15, 1981. On May 6, 1981, appellants executed and delivered a promissory note to PCA in the amount of $267,110. As security for the loans, appellants executed and delivered a security agreement and an open-ended mortgage on portions of their farm to "PCA."

In 1983, appellants began to experience financial difficulty and defauted on accrued interest payments. On June 27, 1983, appellants executed an additional promissory note in the amount of $41,623.43 and as security for the loan executed and delivered another mortgage to PCA. On June 28 and June 30, 1983, appellants executed a Memorandum of Understanding ("memorandum") whereby PCA approved an extension of appellants' loan. The memorandum set forth the terms and conditions of the extension and in part provided that if a real estate sale by appellants did not occur, or if additional collateral was not supplied by August 1, 1983, then PCA could not continue the loan. Appellants made several unsuccessful attempts to sell portions of their farm. Thus, appellants did not comply with the terms of the memorandum and on October 4, 1983, PCA commenced its action in foreclosure in the Court of Common Pleas of Knox County.

Prior to filing her answer, appellant Frances Johnson filed a Civ. R. 12(B) motion for dismissal, alleging that PCA failed to join an indispensable party (Federal Land Bank of Louisville) and failed to state a claim upon which relief could be granted. On November 21, 1983, the trial court conducted an oral hearing on the motion. The trial court overruled the motion, eventually finding that FLB did not have a mortgage upon the real property PCA sought to foreclose. Appellants filed their answer in December 1983, and alleged (1) the note was not yet due and payable, and (2) PCA was estopped by its own actions from bringing this action. On December 13, 1983, PCA filed its motion for summary judgment and a non-oral hearing was set by the trial court for January 13, 1984. On February 2, 1984, appellants' attorney, Robert C. Paxton II, received a letter from the attorney representing PCA. The letter advised Paxton that the motion for summary judgment had been granted in favor of PCA by the trial court and that a judgment entry was enclosed for Paxton's signature. Later that day, Paxton wrote to the trial court judge acknowledging the receipt of notice of the determination of summary judgment in favor of PCA. Paxton also requested findings of fact and conclusions of law pursuant to Civ. R. 52, and informed the judge that he was filing a motion for leave of court to amend appellants' answer to include a new defense "with respect to application of Title 12, Code of Federal Regulations." Paxton did not sign the journal entry. Thereafter, on May 31, 1984, the findings of fact and conclusions of law relating to the summary judgment were filed by the trial court and the grant of summary judgment in favor of PCA was journalized. By journal entry of June 11, 1984, the trial court overruled appellants' motion to amend their answer. Upon appeals, the judgments of the trial court were affirmed in all respects.

In case No. 85-860, appellants are faced with another foreclosure action. In August 1979, appellants borrowed $660,000 from the Federal Land Bank of Louisville at a variable rate of interest. Security for the loan was a mortgage on eight hundred eighty-five acres of the farm. The first payment due on January 1, 1980 was timely paid. The second payment due on January 1, 1981 was paid on January 9, 1981. The 1982 payment was due on January 2, 1982; however, it was not paid in full until August 1982. On August 23, 1982, following receipt of the late payments, FLB wrote to appellants explaining that FLB had examined the appellants' financial condition and found it questionable. FLB also advised appellants that there would be no extensions on the payment due January 1, 1983, and strongly recommended that appellants begin to make provisions for that payment or seek long term credit. The January 1, 1983 payment was not made. A partial payment was made on January 31, 1983; however, no other payments have been made since that date. In early 1983, a local representative of FLB put appellants in touch with a prospective purchaser of farm land in an effort to help appellants reduce their debt. For various reasons, a deal could not be consummated. In July 1983, the local representative notified appellants by letter that further action on their delinquent account would be postponed until August 1, 1983. The letter also stated that if payment was not received by August 1, 1983, FLB would consider collection by legal action. On August 8, 1983, the local representative again wrote appellants and informed them that the deficiency on the loan had to be taken care of before August 15, 1983 or foreclosure would be considered. Appellants were also invited to attend a FLB board meeting on August 15 to provide information to the board or provide a practical means of payment. Appellants did

not respond. The board extended appellants' loan to September 1, 1983; however, no payments or other arrangements were made and on September 26, 1983, FLB filed its complaint in foreclosure.

In response to the complaint, appellant Frances Johnson filed a Civ. R. 12(B) motion to dismiss. The trial court overruled this motion. FLB filed motions for summary judgment which appellants opposed by filing affidavits in opposition. After oral hearing on January 6, 1984, the trial court granted summary judgment in favor of FLB and ordered the sale of the eight hundred eighty-five acres. Appellants then appealed the granting of summary judgment in favor of FLB. On January 25, 1984, with the appeal pending, appellants filed a Civ. R. 60(B) motion for relief from judgment. The sole grounds claimed in the motion were "mistake" and "inadvertence," both of which are grounds for relief under Civ. R. 60(B)(1). On February 3, 1984, the Civ. R. 60(B) motion was supplemented by appellants with a document alleging a new defense with respect to the application of Title 12, Code of Federal Regulations. On May 31, 1984, the court of appeals affirmed the granting of summary judgment by the trial court in favor of FLB. On June 22, 1984, appellants appealed that judgment to this court. On June 25, 1984, the trial court held a hearing on the Civ. R. 60(B) motion, and overruled the motion on July 13, 1984. Appellants then filed their second appeal. On September 19, 1984, this court denied a motion to certify the record for appellants in their first appeal of the granting of summary judgment in favor of FLB. Thereafter, the court of appeals dismissed appellants' second appeal on the Civ. R. 60(B) motion, and on January 23, 1985, this court denied a motion to certify the record on that appeal.

On January 30, 1985, appellants filed another motion for relief from judgment from the summary judgment granted January 6, 1984. This motion was a new request for the trial court to rule on appellants' January 1984 motion for relief from judgment and motion to amend their answer. On February 6, 1985, the trial court held a hearing on all pending motions, and on February 8 all motions were overruled. Upon appeal the court of appeals affirmed the judgment of the trial court.

The causes are now before this court pursuant to the allowance of motions to certify the record.

Nordstrom & Locke and *Kenneth J. Nordstrom*, for appellee Farmers Production Credit Association of Ashland.

Hite & Hite, F. Richard Heath, Patricia W. Maiorino and *James V. Magee, Jr.*, for appellee, Federal Land Bank of Louisville.

Robert C. Paxton II & Associates, Robert C. Paxton II, Crabbe, Brown, Jones, Potts & Schmidt and *William J. Brown*, for appellants.

Thompson, Hine & Flory, Paul W. Brown, Robert P. Mone and *William R. Case*, urging affirmance for *amicus curiae*, Columbus Production Credit Association in case No. 84-1915.

James V. Magee, Jr., Taustine, Post, Sotsky, Berman, Fineman & Kohn, Alvin D. Wax and *Stanley W. Whetzel, Jr.*, urging affirmance for *amicus curiae*, Federal Intermediate Credit Bank of Louisville in case No. 84-1915.

Crabbe, Brown, Jones, Potts & Schmidt and *William J. Brown*, urging reversal for *amicus curiae*, Range Quality Pork, Inc. in case No. 84-1915.

LOCHER, J.

I

Case No. 84-1915

Farmers Production Credit Association v. *Johnson*

The primary issue facing the court in this appeal is whether the trial court abused its discretion in denying appellants' motion for leave to file an amended answer under Civ. R. 15(A). We hold that the trial court did not abuse its discretion.

Our analysis must begin by recognizing that the grant or denial of leave to amend pleadings is within the sound discretion of the trial court. Civ. R. 15(A) reads as follows:

"A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. *Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party.* Leave of court shall be freely given when justice so requires. * * *" (Emphasis added.)

The trial court denied appellants' motion to amend their answer and the court of appeals affirmed, holding:

"We find that the trial court did not abuse its discretion in denying the motion to amend the answer. No answer was tendered and the allegations in the motion do not state a valid defense."

We agree.

Appellants attempted to amend their answer for the purpose of raising as a defense the Farm Credit Act of

1971, Section 2001 *et seq.*, Title 12, U.S. Code, and specifically, 12 C.F.R., Section 614.4510. That regulation provides in pertinent part:

"(d) In the development of the bank and association loan servicing policies and procedures, the following criteria shall be included:

"(1) * * * The policy shall provide a means of forbearance for cases when the borrower is cooperative, making an honest effort to meet the conditions of the loan contract, and is capable of working out of the debt burden. * * *"

Appellants aver that they were cooperative, could make an honest effort to meet the conditions of the loan contract, and were capable of working out of the debt burden. Additionally, they contend PCA did not provide a policy of forbearance. Appellants argue that this is clearly a valid defense. They rely solely on *DeLaigle* v. *Federal Land Bank of Columbia* (S.D. Ga. 1983), 568 F. Supp. 1432, for the proposition that the forbearance language of 12 C.F.R., Section 614.4510 is a mandatory requirement in the servicing of farm loans and that a violation of the regulation is a defense to a foreclosure action. *DeLaigle, supra,* held that 12 C.F.R., Section 614.4510 has the " 'force and effect of law' " *id.* at 1437; however, it did not specifically hold that the Farm Credit Act of 1971 or its regulations provided any sanctions that could be translated into a right of action or defense in a foreclosure action if a farm credit agency fails to adopt a forbearance policy.

We do not find that the law is as "clear" as appellants perceive, especially in light of *Smith* v. *Russellville Production Credit Assn.* (C.A. 11, 1985), 777 F. 2d 1544. That decision provides:

"* * * [T]he 'means of forbearance' regulation in the present case is not a substantive rule but, rather, is a general statement of agency policy. The regulation states that, when banks and associations develop their loan servicing policies and procedures, '*the policy* shall provide a means of forbearance' for borrowers meeting certain criteria. 12 C.F.R. § 614.4510(d)(1) (emphasis added). Although the term 'shall' indicates the mandatory nature of this policy, the regulation is nevertheless directed at agency policy, and is not a substantive rule. Accordingly, we hold that 12 C.F.R. § 614.4510(d)(1) does not have the force and effect of law * * *." *Id.* at 1548. See, also, *Spring Water Dairy, Inc.* v. *Federal Intermediate Credit Bank of St. Paul* (D. Minn. 1986), 625 F. Supp. 713; *Bowling* v. *Block* (S.D. Ohio 1985), 602 F. Supp. 667, 670-671.

We agree with this view and, therefore, hold that the specific language of 12 C.F.R., Section 614.4510(d)(1) does not provide a valid defense to a foreclosure action.

Assuming *arguendo* that the regulation was a valid defense, appellants direct this court's attention to the fact that they met the conditions necessary under the regulation to be provided with a means of forbearance. However, the lender is the one best able to make the determination as to whether the conditions have been met, especially with regard to the borrowers' ability to pay the debt. In *Federal Land Bank of Wichita* v. *Read* (1985), 237 Kan. 751, 703 P.2d 777, the Supreme Court of Kansas held at 237 Kan. at ....., 703 P.2d at 780:

"Under the circumstances, we know of no reason why the trial court should be required to hear evidence upon and redetermine the issue of ability to work out of the debt burden. The matter is best left to those in whom the land bank places that responsibility. * * * We find

no statutory authority for court review of such a determination."

Additionally, it is clear in the instant action that PCA did provide a means of forbearance. PCA had a written policy of forbearance and extended appellants' loan by means of the Memorandum of Understanding. It eventually became obvious to PCA that the only method remaining to collect from appellants was by the foreclosure action which it did not file until two months after the August 1, 1983 loan extension deadline.

We find that appellants' allegations in the motion for leave to amend their answer did not state a valid defense and hold that the trial court did not abuse its discretion in denying said motion. In addition, appellants aver by way of several contentions that summary judgment was improperly granted in favor of PCA by the trial court. Upon review of the record, we find no merit in appellants' contentions and affirm the judgment of the court of appeals.

II

Case No. 85-860

Federal Bank of Louisville v. *Johnson*

The primary issue in this action is whether the appellants' motion for relief from judgment under Civ. R. 60(B) was properly denied. We hold that it was:

Civ. R. 60(B) provides in pertinent part:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect * * *."

This court held in *Svoboda v. Brunswick* (1983), 6 Ohio St. 3d 348, 351, that: "In order to prevail on a motion brought under Civ. R. 60(B), a movant must show (1) the existence of a meritorious defense or claim, (2) entitlement to relief under one of the grounds set forth in the rule, and (3) that the motion is made within a reasonable time. *GTE Automatic Electric* [v. *ARC Industries* (1976), 47 Ohio St. 2d 146 (1 O.O.3d 86)], *supra,* paragraph two of the syllabus."

Appellants contend that their "meritorious defense" is the "forbearance defense" of 12 C.F.R., Section 614.4510 (d) (1) based upon *DeLaigle, supra.* In Part I of this opinion we held that the specific language of 12 C.F.R., Section 614.4510(d) (1) does not provide a valid defense to a foreclosure action. Thus, it is not a meritorious defense and appellants have not satisfied the first prong of the test necessary to prevail on a Civ. R. 60(B) motion. Additionally, appellants do not satisfy the second prong of the test. Appellants' motion for relief from judgment states:

"It is Defendants' main contention in this Motion that the trial court should 'open the judgment' which granted Federal Land Bank ('FLB') its foreclosure on the summary judgment previously filed."

In general, the motion refers to mistake and inadvertence by the trial court in granting the original summary judgment in January 1984. That judgment was affirmed after appropriate appellate review. The court of appeals affirmed the judgment on May 31, 1984 and this court denied further review on September 19, 1984. We agree with the opinion of the court of appeals below in which it states: "A claim that a lawsuit which has been decided and for which all appeal has ended was incorrectly decided is not the kind of 'mistake' or 'inadvertence' con-

templated in Civ. R. 60." Thus, appellants fail to satisfy the first two requirements needed to prevail on a motion for relief from judgment under Civ. R. 60(B). Accordingly, we hold that appellants' motion for relief from judgment was properly denied.

Based on the foregoing, we affirm the judgment of the court of appeals in both actions.[1]

Judgments affirmed.

SWEENEY, HOLMES and WRIGHT, JJ., concur.

CELEBREZZE, C.J., C. BROWN and DOUGLAS, JJ., dissent.

CLIFFORD F. BROWN, J., dissenting. In my view, the Farm Credit Act of 1971 and regulations thereunder evidence a statutory scheme designed with the conciliatory purpose of avoiding farm foreclosures as have occurred in the cases at bar. I simply cannot ignore that foreclosure poses a dire threat to the traditional family farm and to the hardworking men and women who daily face the unenviable task of feeding this nation. It is clear to me that foreclosure should be a last, and thoroughly considered, resort.

In view of that background, the breach of the federal regulatory requirement that lenders' loan servicing policies "*shall* provide a means of forbearance for cases when the borrower is cooperative, making an honest effort to meet

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1. This court takes notice that the strength of our state lies in its agricultural industry. We also recognize that many of this nation's family farms which are products of generations of hard work and sacrifice have succumbed to the perils of foreclosure. High interest rates and declining exports have created the worst farm depression since the 1930s. The men and women who toil to feed not only this nation, but the entire world, deserve a much better fate. With this in mind, we urge our federal government to take the measures necessary to provide these proud men and women with the relief they so justly deserve.

the conditions of the loan contract, and is capable of working out of the debt burden," (emphasis added) 12 C.F.R., Section 614.4510, rises to an actionable, potentially meritorious defense to a foreclosure action, and necessarily presents an issue of fact which must be determined by the trial court. The majority's conclusion to the contrary is, I submit, misguided.

Accordingly, I dissent.

CELEBREZZE, C.J., concurs in the foregoing dissenting opinion.

DOUGLAS, J., dissenting. Before the trial court below was appellants' motion for leave to file an amended answer, pursuant to Civ. R. 15(A), to raise as a defense appellees' failure to comply with provisions of the Farm Credit Act of 1971. The Farm Credit Act of 1971, specifically Section 2019, Title 12, U.S. Code, states in part:

"The Federal land banks may provide technical assistance to borrowers, members, and applicants and may make available to them at their option such financial related services appropriate to their on-farm and aquatic operations as determined to be feasible by the board of directors of each district bank, under regulations of the Farm Credit Administration."

The objectives of the policies and procedures for federal land banks are enumerated in 12 C.F.R., Section 614.4510 which includes the following provisions:

"The bank and associations that are originating lenders shall be responsible for the servicing of the loans which they make. * * * The bank board of directors *shall* direct the bank and associations *to adopt loan servicing policies and procedures to assure that loans will be serviced fairly*

and equitably for the borrower while minimizing the risk for the bank and associations. Procedures *shall* include *specific plans* which help preserve the quality of sound loans and which help credit deficiencies as they develop." (Emphasis added.)

More specifically, 12 C.F.R., Section 614.4510(d)(1) provides:

"(d) In the development of the bank and association loan servicing policies and procedures, the following criteria *shall* be included:

"(1) * * * The objective shall be to provide borrowers with prompt and efficient service * * *. The policy *shall* provide a means of forbearance for cases when the borrower is cooperative, making an honest effort to meet the conditions of the loan contract, and is capable of working out of the debt burden. * * *"

The record in this case indicates that the appellees, Farmers Production Credit Association of Ashland and the Federal Land Bank of Louisville, either had no forbearance policy in effect at the time of foreclosure or such policy was never shown or made known to the appellants. Conversely, appellants alleged that they were cooperative, were making an honest effort to meet the conditions of the loan, and were capable of working out of the debt burden. Nevertheless, relying upon the holding of the Eleventh Circuit Court of Appeals in *Smith v. Russellville Production Credit Assn.* (C.A. 11, 1985), 777 F. 2d 1544, the majority has held that appellees' failure to comply with the requirements of 12 C.F.R., Section 614.4510(d)(1) "does not provide [the appellants with] a valid defense to a foreclosure action." Most significantly, the *Smith* court held at 1548:

"Like the provision in [*United States* v.] *Harvey* [(C.A. 5, 1981), 659 F.2d 62], the 'means of forbearance' regulation in the present case is not a substantive rule but, rather, is a general statement of agency policy. The regulation states that, when banks and associations develop their loan servicing policies and procedures, *'the policy* shall provide a means of forbearance' for borrowers meeting certain criteria. * * * Although the term 'shall' indicates the mandatory nature of this policy, the regulation is nevertheless directed at agency policy, and is not a substantive rule. Accordingly, we hold that 12 C.F.R. § 614.4510(d)(1) does not have the force and effect of law, and does not provide the basis for an implied right of action * * *."

In so holding, the *Smith* court rejected the reasoning and holding of the Southern District Court of Georgia in the case of *DeLaigle* v. *Federal Land Bank of Columbia* (D. Ga. 1983), 568 F. Supp. 1432, 1437, that the regulation herein, has "the 'force and effect' of law." It is my opinion, however, that *DeLaigle* was properly decided and that for the following reasons the *Smith* court erred. In the first place, the *Smith* court improvidently relied for its analysis upon the Fifth Circuit Court's rationale in *Harvey*. In *Harvey*, the court considered whether a provision[2] in a Veterans Administration ("VA") loan servicing manual imposed an affirmative foreclosure avoidance duty on the VA, and thereby created a right in the mortgagor to this performance. The VA manual stated at paragraph 2.20(e):

" 'After the reasons for default have been determined, indulgence *may be* extended for a reasonable time to a

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2. See paragraph 2.20(e) of the Veterans Administration Loan Guaranty Operation for Regional Offices—Loan Management and Servicing Policies, Procedures and Methods, M-26-3.

worthy borrower who is unable immediately to begin the liquidation of his arrearage.'" (Emphasis added). *Id.* at 63.

The *Harvey* court found this provision to be merely a general statement of the agency's own policy, stating at 64 that:

"* * * '[I]n order for a regulation to have the "force and effect of law," it must have certain substantive characteristics and be the product of certain procedural requisites.' * * * More specifically, the regulation must be a substantive or legislative-type rule—*i.e.* one 'affecting individual obligations,' * * * which has been issued by the agency pursuant to statutory authority and promulgated in accordance with the procedural requirements of the Administrative Procedure Act." (Citations omitted.)

Conversely, as noted by the *DeLaigle* court at 1437:

"* * * [T]he Federal Farm Credit Board issued the regulations in question in this case, pursuant to the authority specified in the statutory section labelled 'Powers of the Federal Farm Credit Board,' 12 U.S.C. § 2243 (1976). Section 2243 states in part that '[t]he Federal Farm Credit Board shall establish the general policy for the guidance of the Farm Credit Administration.' The loan servicing techniques that Federal land banks may provide—according to 12 U.S.C. § 2019 (1976)—are subject to the regulations of the Farm Credit Administration. * * *

"* * *

"* * * [Additionally, there is no] evidence suggesting that section 615.4510 does not comply with the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (1976). The Court notes that this regulation appeared at 37 F.R. 11424 on June 7, 1972. Without any indication otherwise,

the Court concludes that the regulation in question here was issued in accordance with the procedural requirements of the Administrative Procedure Act."

Consequently, I agree with the court's conclusion in *DeLaigle* that "these regulations * * * were issued by the appropriate agency pursuant to statutory authority" and therefore should have the " 'force and effect of law.' " *Id.* Unlike the VA manual in *Harvey,* Section 614.4510 is a formal agency regulation, promulgated pursuant to statutory authority.

Secondly, Section 614.4510(d)(1) states that there "shall"' be a means of forbearance provided. The use of the word "shall" mandates agency policy. The provisions of this regulation are rules which must be followed by federal land banks when they service farm loans. On the other hand, the appellant-borrowers in *Harvey* conceded that the VA manual's provisions *were not* formal agency requirements. *Id.* at 64. Additionally, the *Harvey* court noted that the language of the manual was "clearly permissive rather than mandatory" and "[o]n its face * * * does not purport to create a binding obligation." *Id.* The court also observed that the manual itself characterized the provisions for servicing defaulted loans as mere "preferable," and in paragraph 2.18(c) of the manual, it is stated that "strict compliance with these procedures may be impracticable or even impossible under certain conditions." *Id.* As such, where it is alleged that the bank has failed to comply with Section 614.4510(d)(1), as in the case *sub judice,* a valid defense to the bank's foreclosure action may exist.

While I intend to make no attempt to frustrate banks in the conduct of their business, including foreclosure where required, the cases at bar should be remanded and

given a hearing on the merits under the facts presented. If it can be shown that the criteria outlined in Section 614.4510(d)(1) were not met by the appellants, foreclosure is warranted and should be upheld. However, compliance on the appellants' part may well require the opposite result.

For the foregoing reasons, I must respectfully dissent.

OHIO DEPARTMENT OF AGRICULTURE
Reynoldsburg, Ohio 43061
Telephone: 846-6362

May 26, 1981

The 5-14-81 Brucellosis test of cattle reported under your name disclosed cattle that were classed as positive or suspect. Therefore, in accordance with Section 941.25 of the Revised Code, the following applies.

POSITIVE CATTLE – MAY NOT BE KEPT FOR MORE THAN 90 DAYS FOR ANY REASON AND MUST BE BRANDED IF KEPT FOR MORE THAN 30 DAYS.

1. May be sold for immediate slaughter.
    a. Must be tagged with a reactor tag.
    b. Must be accompanied with a movement permit.
2. May be slaughtered by the owner.
    a. Proof of slaughter is required.
    b. The ear containing the identification tag is acceptable proof of slaughter.
3. May be kept on the farm under quarantine for not more than 90 days.
    a. Must be kept in a manner that does not expose other herds.
    b. Must be hot iron branded on the left jaw with the letter "B" if kept more than 30 days.

HERDS WITH POSITIVE CATTLE

1. The entire herd is quarantined.
2. No animal may be moved to or from a quarantined herd without permission from the department.

SUSPECT CATTLE

1. May be kept on the farm indefinitely under quarantine.
    a. Must be kept in a manner that does not expose another herd.
    b. May be rejected;
        (1) As desired by the owner,
        (2) As required by State-Federal officials.
    c. In some cases may be reclassified if owner can supply vaccination information.
2. May be sold for immediate slaughter.
    a. Must be tagged with a reactor tag.
    b. Must be accompanied by a movement permit.
3. May be slaughtered by the owner.
    a. Proof of slaughter is required.
    b. The ear containing the identification tag is acceptable proof of slaughter.
4. It may be necessary to retest the entire herd if the suspect is not available for retest (sold-slaughtered-died-etc.).

MOVEMENT PERMITS, TAGGING INFORMATION may be obtained from the State-Federal Veterinary Medical Officer in your district:

Dr. Gerald Shook	Gambier	614-427-3315
(Name)	(Town)	(Phone)

OHIO DEPARTMENT OF AGRICULTURE
/s/ Harry E. Goldstein
Harry E. Goldstein, D.V.M.
Chief

Exhibit B

More losses because of the brucellosis:

Trucking—black cattle from Lexington, Nebraska to Fredericktown, Oh.; trips to Wooster, Oh.; to Mt. Vernon, Oh. and Utica, N.Y. to dispose of all the cattle required by the government	$7,500.
Testing—includes corral facilities, labor, 4 tests, plus few were done at other times	8,000.
Feed and maintenance for 97 head of cattle that were lost because of brucellosis	48,000.
Could not have 1981 Sale, could not exhibit at county, state or out of state shows, could not consign to sales	225,000.
Potential of 10 heifers lost by getting bred too young because of quarantine, @ $10,000 each	100,000.
Potential of cattle for future years	190,000.
Total	$578,500.

TITLE 12—BANKS AND BANKING

AMENDMENTS

1980—Pub. L. 96-592 added provisions relating to disposal of property and deposit of amounts from such disposal.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2251 of this title.

§ 2250. Allocation of expenses for administrative services: disposition of money

(a) The Farm Credit Administration shall prior to the first day of each fiscal year estimate the cost of administrative expenses for the ensuing fiscal year in administering this chapter, including official functions, and shall apportion the amount so determined among the institutions of the System on such equitable basis as the Farm Credit Administration shall determine, and shall assess against and collect in advance the amounts so apportioned from the institutions among which the apportionment is made.

(b) The amounts collected pursuant to subsection (a) of this section shall be covered into the Treasury, and credited to a special fund and, without regard to other law, shall be available to said Administration for expenditure during each fiscal year for salaries and expenses of said Administration. As soon as practicable after the end of each such fiscal year, the Administration shall determine, on a fair and reasonable basis, the cost of operation of the Farm Credit Administration and the part thereof which fairly and equitably should be allocated to each

bank and association as its share of the cost during the fiscal year of such Administration. If the amount so allocated is greater than the amount collected from the bank or other institutions, the difference shall be collected from such bank or other institutions, and, if less, shall be refunded from the special fund to the bank or other institutions entitled thereto or credited in the special fund to such bank or other institutions for use for the same purposes in future fiscal years.

(Pub. L. 92-181, title V, § 5.16, Dec. 10, 1971, 85 Stat. 620.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2249, 2251 of this title.

§ 2251. Quarters and facilities for the Farm Credit Administration

As an alternate to the rental of quarters under section 2249 of this title, and without regard to any other provision of law, the banks of the System, with the concurrence of two-thirds of the district boards, are hereby authorized—

(1) To lease or acquire real property in the District of Columbia or elsewhere for quarters of the Farm Credit Administration.

(2) To construct, develop, furnish, and equip such building thereon and such facilities appurtenant thereto as in their judgment may be appropriate to provide, to the extent the Federal Farm Credit Board may deem advisable, suitable, and adequate quarters and facilities for the Farm Credit Administration

(3) To enlarge, remodel, or reconstruct the same.

(4) To make or enter into contracts for any of the foregoing.

(5) To sell or otherwise dispose of any interest in property leased or acquired under the foregoing if authorized by the board.

In actions undertaken by the banks pursuant to the foregoing provisions of this section, the Farm Credit Administration may act as agent for the banks. The Board may require of the respective banks of the System, and they shall make to the Farm Credit Administration, such advances of funds for the purposes set out in this section as in the sole judgment of the Board may from time to time be advisable for the purposes of this section. Such advances shall be in addition to and kept in a separate fund from the assessments authorized in section 2250 of this title and shall be apportioned by the Board among the banks in proportion to the total assets of the respective banks, and determined in such manner and at such times as the Board may prescribe. The powers of the banks of the System and purposes for which obligations may be issued by such banks are hereby enlarged to include the purpose of obtaining funds to permit the making of advances required by this section. The plans and decisions for such building and facilities and for the enlargement, remodeling, or reconstruction thereof shall be such as is approved in the sole discretion of the Board.

(Pub. L. 92-181, title V, § 5.17, Dec. 10, 1971, 85 Stat. 621; Pub. L. 96-592, title V, § 506, Dec. 24, 1980, 94 Stat. 3449.)

AMENDMENTS

1980—Pub. L. 96-592 added par. (5) and provisions respecting agency status of Administration for the banks.

§ 2252. Powers and duties

(a) Enumerated powers

The Farm Credit Administration shall have the following powers, functions, and responsibilities in connection with the institutions of the Farm Credit System and the administration of this chapter:

(1) Modify the boundaries of farm credit districts, with due regard for the farm credit needs of the country, as approved by the Federal Farm Credit Board, with the concurrence of the district boards involved.

(2) Where necessary or appropriate to carry out the policy and objectives of this chapter, issue and amend or modify Federal charters or the bylaws of institutions of the System; approve change in names of banks operating under this chapter; approve the merger of districts when agreed to by the boards of the districts involved and by a majority vote of the voting stockholders and contributors to the guaranty funds of each bank for each of such districts, voting in the same manner as is provided in section 2181 of this title; approve mergers of banks operating under the same subchapter of this chapter, merger of Federal land bank associations, merger of production credit associations and the consolidation or division of the territories which they serve; and approve consolidations of boards of directors or management agreements. Such mergers shall be encouraged where such action will improve service to borrowers and the financial stability, effect economies of operation, or permit desirable joint management, or consolidation of territories and office quarters.

(3) Make annual reports directly to the Congress on the condition of the System and its institutions and on

the manner and extent to which the purposes and objectives of this chapter are being carried out and, from time to time, recommended directly legislative changes. The annual reports shall include a summary and analysis of the reports submitted to the Farm Credit Administration by the Federal land banks and Federal intermediate credit banks under section 2207(b) of this title relating to programs for serving young, beginning, and small farmers and ranchers.

(4) Except for associations, approve the salary scale for employees of the institutions of the System, and approve the compensation of the chief executive officer of such institutions.

(5) Coordinate the activities of the banks in making studies of lending standards, including appraisal and credit standards; approve national and district standards, procedures, and appraisal forms; prescribe price and cost levels to be used in such standards, appraisals, and lending; supplement the work of the district under the foregoing where necessary to accomplish the purposes of this chapter.

(6) Prescribe loan security requirements and the types, classes, or number of loans which may be made only with prior approval.

(7) Conduct loan and collateral security review.

(8) Approve the issuance of obligations of the institutions of the System and execute on behalf of the banks consolidated and System-wide obligations for the purpose of funding the authorized operations of the institutions of the System, and prescribe collateral therefor.

(9) Approve interest rates paid by institutions of the System on their bonds debentures, and similar obligations, the terms and conditions thereof, and interest or other charges made by such institutions to borrowers.

(10) Make investments in stock of the institutions of the System as provided in section 2151 of this title out of the revolving fund, and require the retirement of such stock.

(11) Regulate the borrowing, repayment, and transfer of funds and equities between institutions of the System.

(12) Coordinate and assist in providing services necessary for the convenient, efficient, and effective management of the institutions of the System.

(13) Undertake research into the rural credit needs of the country and ways and means of meeting them and of the funding of the operations of the System in relation to changing farming and economic conditions.

(14) Prepare and disseminate information to the general public on use, organization, and functions of the System and to investors on merits of its securities.

(15) Require surety bonds or other provision for protection of the assets of the institutions of the System against losses occasioned by employees.

(16) Prescribe rules and regulations necessary or appropriate for carrying out the provisions of this chapter.

(17) Exercise such incidental powers as may be necessary or appropriate to fulfill its duties and carry out the purposes of this chapter.

(b) Proposed and final regulations; procedures applicable

(1) At least thirty days prior to publishing any proposed regulation in the Federal Register, the Farm Credit Administration shall transmit a copy of the regulation to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition,

and Forestry of the Senate. The Farm Credit Administration shall also transmit to such committees a copy of any final regulation prior to its publication in the Federal Register. Except as provided in paragraph (2) of this subsection, no final regulation of the Farm Credit Administration shall become effective prior to the expiration of thirty calendar days after it is published in the Federal Register during which either or both Houses of the Congress are in session.

(2) In the case of an emergency, a final regulation of the Farm Credit Administration may become effective without regard to the last sentence of paragraph (1) of this subsection if the Farm Credit Administration notifies in writing the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate setting forth the reasons why it is necessary to make the regulation effective prior to the expiration of the thirty-day period.

(c) Legislative veto of regulations; procedures applicable

(1) If there are any unresolved differences between the Farm Credit Administration and the Board of Governors of the Federal Reserve System as to whether any regulation implementing section 2128(b) of this title or the other provisions of subchapter III relating to the authority under section 2128(b) of this title conforms to national banking policies, objectives and limitations, simultaneously with promulgation of any such regulation under this chapter, and simultaneously with promulgation of any regulation implementing section 2074 of this title, the Farm Credit Administration shall transmit a copy thereof to the Secretary of the Senate and the Clerk of the House of Representatives. Except as provided in paragraph (2), * * *

§ 614.4470 Loans subject to bank approval.

(a) The following loans (unless such loans are of a type prohibited under Part 612) shall be subject to prior approval of the bank supervising the association in which the loan application originates:

(1) Loans to a director of the association.

(2) Loans to a director of an association which is under joint management when the application originates in one of the associations.

(3) Loans to an employee of the association.

(4) Loans to an employee of an association which is under joint management when the application originates in one of the associations.

(5) Loans to bank employees when the application originates in one of the associations supervised by the employing bank.

(b) Loans to any borrower shall be subject to the prior approval of the bank supervising the association in which the loan application originates whenever a director or an employee of the association or an employee of the bank supervising the association:

(1) Will receive proceeds of the loan in excess of the amount prescribed by the supervising bank board and approved by the Farm Credit Administration, or

(2) Has a significant personal or beneficial interest in the loan, the proceeds or the security, or controls the borrower, or

(3) Is an endorser, guarantor, or comaker with respect to the loan in excess of an amount prescribed by the supervising bank board and approved by the Farm Credit Administration.

(c) Any loan which will result in any one borrower being obligated (as defined in § 614.4360(b)) in excess of an amount established by the supervising bank under its policies for delegation of authority to associations shall be subject to prior approval of the supervising bank.

[47 FR 49832, Nov. 3, 1982]

Subpart N—Loan Servicing Requirements

AUTHORITY: Secs. 5.9, 5.12, 5.18, Pub. L. 92-181, 85 Stat. 619, 620, 621, 12 U.S.C. 2243, 2246, and 2252.

§ 614.4510 General.

The bank and associations that are originating lenders shall be responsible for the servicing of the loans which they make. However, loan participation agreements may designate specific loan servicing efforts to be accomplished by a participating institution. The bank board of directors shall direct the bank and associations to adopt loan servicing policies and procedures to assure that loans will be serviced fairly and equitably for the borrower while minimizing the risk for the bank and associations. Procedures shall include specific plans which help preserve the quality of sound loans and which help credit deficiencies as they develop.

(a) The Federal land bank shall provide guidelines for the servicing of loans by the Federal land bank associations. The servicing may be accomplished either under the direct supervision of the banks or under delegated authority.

(b) The supervisory Federal intermediate credit bank shall provide guidelines for the production credit associations to use in establishing their loan servicing policies

and procedures plus any limitations requiring the approval of the bank.

(c) The servicing of loans which are participated in by Farm Credit System institutions shall be in accordance with § 614.4330.

(d) In the development of the bank and association loan servicing policies and procedures, the following criteria shall be included:

(1) *Term loans.* The objective shall be to provide borrowers with prompt and efficient service with respect to justifiable actions in such areas as personal liability, partial release of security, insurance requirements or adjustments, loan division or transfers, conditional payments, extensions, deferments or reamortizations. Procedures shall provide for adequate inspections, reanalysis, reappraisal, controls on payment of insurance and taxes (and for payment when necessary), and prompt exercise of legal options to preserve the lender's collateral position or guard against loss. The policy shall provide a means of forbearance for cases when the borrower is cooperative, making an honest effort to meet the conditions of the loan contract, and is capable of working out of the debt burden. Loan servicing policies for rural home loans shall recognize the inherent differences between agricultural and rural home lending.

(2) *Operating loans.* The objective shall be to service such loans to assure disbursement in accordance with the basis of approval, repayment from the sources obligated or pledged and to minimize risk exposure to the lender. Procedures shall require: (i) The procurement of periodic operating data essential for maintaining control, for the proper analysis of such data, and prompt action as needed; (ii) inspections, reappraisals, and borrower visits appropri-

ate to the nature and quality of the loan; (iii) controls on insurance, margin requirements, warehousing, and the prompt exercise of legal options to preserve the lender's collateral position and guard against loss. The policy shall provide a means of forbearance for cases when the borrower is cooperative, making an honest effort to meet the conditions of the loan contract and is capable of working out of the debt burden.

(3) *Legal entity loans.* In addition to the foregoing servicing objectives for term and operating loans, procedures for servicing these loans shall require procurement of data on changes in ownership, control, and management; review of business objectives, financing programs, organizational structure, and operating methods, and appropriate analysis of such changes with provision for action as needed.

(4) *Approved policies.* Copies of the bank loan servicing policies required under this Subpart O and all subsequent revisions shall be furnished to the Farm Credit Administration.

[37 FR 11424, June 7, 1972, as amended at 40 FR 7745, Apr. 22, 1975. Redesignated at 46 FR 51878, Oct. 22, 1981 and amended at 48 FR 54475, Dec. 5, 1983]

EFFECTIVE DATE NOTE: At 48 FR 54475, Dec. 5, 1983, § 614.4510 was amended by revising the introductory text and paragraphs (b), (c), and (d) introductory text, effective "Thirty days from this publication date, provided either or both Houses of Congress are in session. Notice of date will be published." The introductory text and paragraphs (b), (c), and (d) introductory text published at 37 FR 11424, June 7, 1982, as amended at 44 FR 30316, May 25, 1979, and currently in effect are set forth below.

§ 614.4510 General.

The banks and associations that are primary lenders shall be responsible for the servicing of the loans which they make. The boards of directors shall direct the banks and associations to adopt loan servicing policies and procedures to assure that loans will be serviced fairly and equitably for the borrower while minimizing the risk for the lender. Procedures shall include specific plans which help preserve the quality of sound loans and which help correct credit deficiencies as they develop.

. . .

(b) The Federal intermediate credit bank shall provide guidelines for the production credit associations to use in establishing their loan servicing policies and procedures plus any limitations requiring approval of the bank. Bank policies shall govern the servicing of loans in which the bank is a direct maker via participation with a production credit association.

(c) The loan servicing policies of a bank for cooperatives shall be applicable to loans made by it individually and, except as otherwise provided for in a formal participation agreement or any agreement arising pursuant thereto, to loans in which other lenders, including other banks for cooperatives, participate.

THE SUPREME COURT OF OHIO
COLUMBUS

1986 TERM

To wit: July 30, 1986
Case Nos. 84-1915 and 85-860

R. Lee Johnson et al.,
Appellants,

v.

Federal Land Bank of
Louisville, et al.,
Appellees.

REHEARING ENTRY

(Knox County)

It is ordered by the Court that rehearing in these cases be, and the same are hereby, denied.

/s/ Frank D. Celebrezze
Frank D. Celebrezze
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 30th day of July, 1986.

James Wm. Kelly, Clerk
/s/ Daniel J. Crowley, Deputy

THE SUPREME COURT OF OHIO
COLUMBUS

1986 TERM

To wit: June 23, 1986
Case No. 84-1915 and 85-860

Farmers Production Credit Association
of Ashland, et al.,
Appellees,

v.

R. Lee Johnson et al.,
Appellants.

ORDER

These causes, here on appeal from the Court of Appeals for Knox County, were considered in a manner prescribed by law. This Court, having rendered its final decision on June 11, 1986, now comes to consider the motion of appellants for a stay of execution pending appeal to the United States Supreme Court and the application of appellees for an order directing the Clerk to pay bond money on deposit to appellees.

Upon consideration thereof, it is ordered by the Court that said motion for stay of execution be, and the same is hereby, granted and said application for an order to pay bond money to appellees be, and the same is hereby, denied.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Knox County for entry.

/s/ Frank D. Celebrezze
Frank D. Celebrezze
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 23rd day of June, 1986.

James Wm. Kelly, Clerk
/s/ Daniel J. Crowley, Deputy

THE SUPREME COURT OF OHIO
COLUMBUS

1986 TERM

To wit: September 17, 1986
Case Nos. 84-1915 and 85-860

R. Lee Johnson et al.,
Appellants,

v.

Federal Land Bank of
Louisville,
Appellee.

ENTRY

This cause came before the Court on appeal from the Court of Appeals for Knox County and was heard in a manner prescribed by law. Now, upon consideration of the motion to set bond filed by appellees on September 5, 1986,

IT IS ORDERED by the Court that said motion to set bond be, and the same is hereby, denied.

/s/ Frank D. Celebrezze
Frank D. Celebrezze
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 17th day of September, 1986.

James Wm. Kelly, Clerk
/s/ Daniel J. Crowley, Deputy

Supreme Court, U.S.
FILED
NOV 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-702

SUPREME COURT OF THE UNITED STATES

October Term, 1986

R. LEE JOHNSON AND FRANCES K. JOHNSON,

Petitioners,

vs.

FEDERAL LAND BANK OF LOUISVILLE

AND

FARMERS PRODUCTION CREDIT ASSOCIATION OF ASHLAND,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether 12 C.F.R. §614.4510(d)(1) (1986), the statement of policy which provides for a means of forbearance under the Farm Credit Act of 1971 12 U.S.C.A. §2001 et seq. (1980) as amended, is merely a general statement of agency policy, or a substantive rule and the source of an affirmative legal obligation.

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24 C.F.R. §203.500 (1986)..... 9

Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, Title V, Section 501,99 Stat. 1710 (1985)..... 1,2, 3,13,14

Statutes Involved

In addition to those statutes cited by Petitioners, this case involves 12 C.F.R. §614.4510 (1986) which discusses the need to protect the interests of the mortgagee as well as the mortgagor. It provides:

> (1) Term Loans. The objective shall be to provide borrowers with prompt and efficient service with respect to justifiable actions in such areas as personal liability, partial release of security, insurance requirements or adjustments, loan division or transfers, conditional payments, extensions, deferments or reamortizations. Procedures shall provide for adequate inspections, reanalysis, reappraisal, controls on payment of insurance and taxes (and for payment when necessary), and prompt exercise of legal options to preserve the lender's collateral position or guard against loss. The policy shall provide a means of forbearance for cases when the borrower is cooperative, making an honest effort to meet the conditions of the loan contract, and is capable of working out of the debt burden. Loan servicing policies for rural home loans shall recognize the inherent differences between

agricultural and rural home lending.

Further, the Farm Credit Amendments Act of 1985, Public L. No. 99-205, Title V, Section 501,99 Stat. 1710 (1985), is instructive as to certain Congressional intentions and it provides:

> "(a) The President shall appoint a National Commission on Agricultural Finance. Such Commission shall be comprised of 15 members, of whom 7 shall be appointed by the President and 4 each by the Speaker of the House of Representatives and the President pro tempore of the Senate. The Commission shall consist of representatives of the financial community, the agricultural sector, and government.
>
> "(b) The National Commission on Agricultural Finance shall conduct a study of methods to ensure the availability of adequate credit to agriculture products and agribusiness, taking into account the long-term financing needs of the agricultural economy; the roles of the commercial banks, the Farm Credit System, and the Farmers Home Administration in meeting those financial needs.

"(c) In conducting such study, the National Commission on Agricultural Finance shall--

"(1) evaluate the financial circumstances relative to both lenders and borrowers of farm credit;

"(2) evaluate the structure, performance, and conduct of private lenders--commercial bankers and the Farm Credit System--and public lenders;

"(3) explore the need for long-term assistance in stabilizing the value of agricultural assets; and

"(4) evaluate the effect on suppliers, producers, processors, and local communities when financial institutions fail.

"(d) Not later than one year after the date of the enactment of this Act [Dec. 23, 1985], the Commission shall submit a report containing the results of the study required by this section, together with comments and recommendations for legislation providing for a sound, reasonable, and primarily self-supporting credit program for farmers and ranchers as the Commission considers appropriate, to Congress.

"(e) The Commission shall be comprised of volunteers and no Federal funds shall be expended by the Commission."

Counterstatement of The Case

This case below consisted of two actions consolidated for review. Two Farm Credit Banks, Farmers Production Credit Association of Ashland ("PCA") and Federal Land Bank of Louisville ("FLB") held mortgages on separate portions of Petitioners' farm as security for loans. Both brought foreclosure actions and prevailed.

In each case, petitioners attempted to assert as a defense the "means of forbearance" provision in 12 C.F.R. §614.4510(d)(1) (1986) after the trial court had issued separate rulings granting the lender summary judgment. Petitioners' attempt to belatedly assert the defense became procedurally complex. In the PCA

case, Petitioners filed a Civ. R. 15(A) motion for leave to file an amended answer alleging the "forbearance" defense. In the FLB case, they filed an appeal from the granting of summary judgment and while it was pending filed a Civ. R. 60(B) motion claiming "mistake" and "inadvertence" as grounds. They later supplemented that motion alleging a "forbearance" defense. The Civ. R. 60(B) motion was denied and Petitioners filed another appeal. The Court of Appeals affirmed both the granting of summary judgment and the denial of the Civ. R. 60(B) motion. The Supreme Court of Ohio denied a motion to certify as to each appeal. Thereafter, Petitioners filed yet another Civ. R. 60(B) motion seeking another ruling on the earlier Civ. R. 60(B) motion and a motion to amend their answer. The trial court overruled the motions, and the Court of Appeals affirmed.

The Supreme Court of Ohio in the PCA case affirmed the trial court's denial of Petitioners' motion to amend their answer, agreeing with the Court of Appeals that the trial court had not abused its discretion. In the FLB case, the Supreme Court of Ohio affirmed the denial of Petitioners' Civ. R. 60(B) motion, agreeing with the Court of Appeals that the requirements of Civ. R. 60(B) had not been met. "'A claim that a lawsuit which has been decided and for which all appeal has ended was incorrectly decided is not the kind of "mistake" or "inadvertence" contemplated in Civ. R. 60'". Farmers Production Credit Ass'n of Ashland v. Johnson, 24 Ohio St. 3d 69, 75 (1986). The Court also held that the "means of forbearance" provision in 12 C.F.R. §614.4510(d)(1) (1986) is not a substantive rule, but rather a general statement of policy which does not provide

a valid defense to a foreclosure action. The Court further noted that the Farmers Production Credit Association ("PCA") had a written policy of forbearance which was applied in the administration of its loan. Only after it was determined by the PCA that the sole method remaining for it to collect from Petitioners was through a foreclosure action did the PCA begin to foreclose, some two months after an August 1, 1983 loan extension deadline. Thus, even assuming arguendo that the regulation setting a policy of forbearance was a basis for a defense, the Court indicated an unwillingness to second-guess the lender's determination ". . as to whether the conditions have been met, especially with regard to the borrowers' ability to pay the debt." Id. at 74.

In sum, the Supreme Court of Ohio ruled that 12 C.F.R. §614.4510(d)(1) (1986) does

not provide a valid defense to a foreclosure action, even if Petitioners had timely asserted such a defense in their answers to the foreclosure complaints.

Respondents[1] are otherwise satisfied with Petitioners' statement of the parties to the proceeding, their citation of the lower court's opinion and their jurisdictional statement.

Argument: Reasons for Denying the Writ

I. Introduction

Petitioners have failed to establish any special or important reason why this Court should exercise its discretionary jurisdiction. As demonstrated below, the

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1. As required by Rule 28.1, Rules of the Supreme Court of the United States, all parent corporations, subsidiaries, and affiliates of each corporate defendant are as follows: Federal Land Bank of Louisville, Farmers Production Credit Association of Ashland, Federal Land Bank Association of the Fourth District, and Federal Intermediate Credit Bank.

lower courts are in accord that 12 C.F.R. §614.4510 (1986) is a regulation directed to agency policy, and is not a substantive rule. The decision of the Supreme Court of Ohio correctly held that 12 C.F.R. §614.4510 (1986) does not have the force and effect of law and does not provide a valid defense to a foreclosure action.

Further, the Court held that the trial court did not abuse its discretion in denying Petitioners' motion for leave to amend their answer and for relief from judgment. This Court has traditionally adhered to the applicable principle that it will not review such judgments of state courts that rest on adequate and independent state grounds. Herb v. Pitcairn, 324 U.S. 117 (1945); Jankovich v. Indiana Toll Road Commission, 379 U.S. 487 (1965); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961).

II. The Judgment of The Supreme Court of Ohio Rests On Adequate and Independent State Grounds

This Court has held repeatedly that it will not review state court judgments that rest on adequate and independent state grounds. Id. As demonstrated in our Counterstatement of the Case, the Supreme Court of Ohio predicated its affirmance of the trial court's decisions on state procedural grounds. It found no abuse of discretion in the denial of a motion seeking to amend an answer nor in the trial Court's refusal to grant relief from judgment after all appeals had been exhausted. For this reason alone, this Court should not exercise its discretion to review the judgment of the Supreme Court of Ohio.

III. The Lower Courts Have Concluded That 12 C.F.R. §614.4510 (1986) Is Not A Substantive Rule But Is A General Statement of Agency Policy.

The lower courts overwhelming have determined that 12 C.F.R. §614.4510 (1986) is merely a statement of policy, as discussed below.

Petitioners rely solely on DeLaigle v. Federal Land Bank of Columbia, 568 F. Supp. 1432 (S.D. Ga. 1983), for the proposition that the forbearance language of 12 C.F.R. §614.4510 (1986) is a mandatory requirement in the servicing of farm loans, and that a violation of the policy within the regulation is a defense to a foreclosure action. However, DeLaigle has been essentially overruled by its own 11th Circuit Court of Appeals in Smith v. Russellville Production Credit Ass'n., 777 F.2d 1544 (11th Cir. 1985). In that case, the 11th Circuit disapproved DeLaigle and

determined that 12 C.F.R. §614.4510 (1986) is a regulation directed at agency policy, and is not a substantive rule. Id. at 1548. It squarely held that the "means of forbearance" regulation imposes no legal duty on PCAs to establish loan servicing techniques.[2]

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2. Petitioners seek to support their proposition by arguing that certain HUD regulations have the force and effect of law, and that non-compliance thereof may establish an equitable defense to a mortgage foreclosure action. However, contained in 24 C.F.R. §203.500 (1986) "Mortgage servicing generally," (which they neglected to discuss) is HUD's stated intent that no mortgagee commence foreclosure or acquisition of property until certain servicing requirements have been complied with. It further states that whether a mortgagee's failure to comply constitutes a legal defense to foreclosure is a matter to be determined by the courts. This language is strikingly different from 12 C.F.R. §614.4510 (1986), which establishes the parameters of loan servicing requirements of the Farm Credit Administration. 12 C.F.R. §614.4510 (1986) directs "the bank and associations to adopt loan servicing policies and procedures to assure that

Footnote 2 continued on next page . . .

The 6th Circuit too has reviewed the Farm Credit Act and reasoned that the Act creates no specific enforceable rights upon which a borrower can rely in seeking to bring a private right of action. Bowling v. Block, 602 F. Supp. 667 (S.D. Ohio 1985), aff'd, 785 F.2d 556 (6th Cir. 1986), cert. denied, 55 U.S.L.W. 3233 (U.S. 1986).

Other federal and state courts have followed similar reasoning. See Spring Water Dairy, Inc. v. Federal Intermediate Credit Bank of St. Paul, 625 F. Supp 713 (D. Minn. 1986) (The Farm Credit Act merely establishes a system for providing

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Footnote 2 continued from previous page . . . loans will be serviced fairly and equitably for the borrower while minimizing the risk for the bank and association." Although the statement contains a policy of forbearance under certain circumstances, no where does the regulation require, as does the HUD regulation, forbearance until the policy is complied with. Nor does it leave with the Courts the issue of non-compliance as a possible affirmative defense.

additional credit to farmers, and does not confer specific enforceable rights); Aberdeen Production Credit Ass'n. v. Jarrett Ranches, 638 F. Supp. 534 (D.S.D. 1986) (The Farm Credit Act does not proscribe any conduct as unlawful or create specific enforceable rights on behalf of borrowers); Bowling v. Block, 602 F. Supp. 667 (S.D. Ohio 1985) (The Farm Credit Act does not create specific enforceable rights); Federal Land Bank of Springfield v. Sanders, 108 A.D. 2d 838, 485 N.Y.S. 2d 342 (1985) (The means of forbearance policy does not have the force and effect of law, but is designed to guide discretion); and Federal Land Bank of Wichita v. Read, 237 Kan. 751, 703 P.2d 777 (1985) (A policy of forbearance is required by the regulation, 12 C.F.R. §614.4510 (1985), but there is no statutory authority for court review of such a policy determination).

In sum, the decision below of the Supreme Court of Ohio is fully in accord with the reported decisions of lower federal and state courts, except for Delaigle, 568 F.Supp. at 1432, which has been effectively overruled by the 11th Circuit. Respectfully, it is unnecessary for this Court to exercise its jurisdiction in this case.

IV. The Reasoning Of The Supreme Court Of Ohio Is Supported By Decisions of This Court.

Without the necessary substantive characteristics a regulation cannot be the source of an affirmative legal obligation. Chrysler Corp. v. Brown, 441 U.S. 281 (1979). Such a regulation must be a substantive rule with the force and effect of law and must be distinguished from "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." Id. at 301.

As demonstrated in several of the lower court opinions cited above, the "means of forbearance" regulation in issue is not such a substantive rule. It is no more than a general statement of policy or rule of agency organization, procedure, or practice.

> The regulation states that, when banks and associations develop their loan servicing policies and procedures, "the policy shall provide a means of forbearance" for borrowers meeting certain criteria. 12 C.F.R. §614.4510(d)(1) (emphasis added). Although the term "shall" indicates the mandatory nature of this policy, the regulation is nevertheless directed at agency policy, and is not a substantive rule. Accordingly, we hold that 12 C.F.R. §614.4510(d)(1) does not have the force and effect of law...

Smith v. Russellville Production Credit Assn., 777 F.2d at 1548. The analysis established by this Court in Chrysler Corp. v. Brown, 441 U.S. at 281, compels the conclusion that the language of 12 C.F.R.

§614.4510(d)(1) (1986) is not the source of an affirmative legal obligation, and therefore does not provide a valid defense to a foreclosure action.

V. Congress Has Recently Provided A Means Of Review Of The Farm Credit System, And Mandatory Forbearance May Interfere With Congress' Preferred Method For Ensuring The Availability Of Adequate Credit To Farmers And Agribusiness.

Petitioners suggest that mandatory forbearance is the only means of assuring the continued existence of the American farm. To the contrary, before this case was decided by the Supreme Court of Ohio on June 11, 1986, Congress enacted the Farm Credit Amendments Act of 1985 on December 23, 1985. The Act creates the National Commission on Agricultural Finance to "conduct a study of methods to ensure the availability of adequate credit to agriculture producers and agribusiness,

taking into account the long-term financing needs of the agricultural economy; the roles of the commercial banks, the Farm Credit System, and the Farmers Home Administration in meeting those financial needs." Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, Title V, §501,99 Stat. 1710 (1985), quoted in 12 U.S.C.A. §2001 (West Supp. 1986). This Commission has one year from the date of its creation (Dec. 23, 1985) to "evaluate the financial circumstances relative to both lenders and borrowers of farm credit...(and) evaluate the structure, performance, and conduct of private lenders-commercial bankers and the Farm Credit System..." Id. at Title V, §501(c)(1) and (2). If the Commission determines there is a need for mandatory forbearance such as Petitioners suggest, it may so report to the Congress in its comments and recommendations for any

proposed legislation it believes is needed for a sound, reasonable, and primarily self-supporting credit program for farmers and ranchers.

Conclusion

For the reasons we have discussed, Respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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